

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JESSE J. ATKINS</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>WEBCON</b>	)	
Respondent/Appellee	)	
	)	
AND	)	Docket No. 8,500,220
	)	
<b>KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND</b>	)	
Insurance Carrier/Appellee	)	
	)	
AND	)	
	)	
<b>PROMISE REGIONAL MEDICAL CENTER</b>	)	
Appellant	)	
	)	
AND	)	
	)	
<b>RADIOLOGY PROFESSIONALS OF HUTCHINSON</b>	)	
Appellant	)	

**ORDER**

**STATEMENT OF THE CASE**

Appellants Promise Regional Medical Center (Promise Regional) and Radiology Professionals of Hutchinson (Radiology Professionals) request review of the December 22, 2011, Initial Order entered by Presiding Officer Sandra L. Sharon. The Board heard oral argument on April 3, 2012. Pursuant to an order dated March 6, 2012, the Director appointed Jeffrey King to serve as Appeals Board Member Pro Tem in place of recused Board Member Thomas D. Arnhold. Melinda G. Young, of Hutchinson, Kansas, appeared

for the claimant and appellants. Roy T. Artman, of Topeka, Kansas, appeared for appellees respondent and its insurance carrier.

The Board has adopted the stipulations listed in the Initial Order. The Initial Order of the Hearing Officer lists no record. Accordingly, the record considered by the Board consists only of the Initial Order.

### ISSUES

The Presiding Officer, who was appointed by the Director pursuant to K.S.A. 44-510j(d)(e), found that Kansas Medicaid was reimbursed by Kansas Building Industry Workers Compensation Fund for medical services provided to claimant by Promise Regional and Radiology Professionals. The Presiding Officer further found that agreements had been entered into between Kansas Medicaid and Radiology Professionals and between Kansas Medicaid and Promise Regional. Although the agreements are not in the record, the Presiding Officer found that Promise Regional and Radiology Professionals must accept, as payment in full, the amounts paid to them by Kansas Medicaid. The Presiding Officer concluded that the obligation of appellees to pay Promise Regional and Radiology Professionals ended when Kansas Medicaid was reimbursed for the amounts it paid to appellants.

Appellants frame the issue as “whether the Kansas Worker’s Compensation Act governs worker’s compensation claims, including payment of medical bills for treatment of work-related injuries which are covered by the Act.”<sup>1</sup> Appellants contend that this claim is covered by the Kansas Workers Compensation Act because both Administrative Law Judge Brad Avery, in a preliminary hearing order dated February 24, 2010, and the Workers Compensation Board, by order rendered by Board Member Julie A. N. Sample dated April 21, 2010, found claimant’s claim to be compensable. Appellants maintain that payment for medical treatment of injuries covered by the Kansas Workers Compensation Act (Act) shall be made pursuant to the Workers Compensation Medical Fee Schedule (fee schedule) and, therefore, the Board should find that appellees should pay appellants for the amounts those medical providers charged, subject to the fee schedule, less amounts already received by appellants from Kansas Medicaid.

Appellees argue appellants have been paid in full by Kansas Medicaid and may not now ask for payment from appellees for the difference between what they were paid by Medicaid and the amounts allowed under the fee schedule.

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<sup>1</sup> Appellants’ Brief filed February 6, 2012, at 1.

**FINDINGS OF FACT**

The issues raised in this matter were submitted to the Presiding Officer on stipulated facts. The stipulated facts are set forth on pages one and two of the Initial Order and are as follows:

1. The Claimant, Jesse Atkins, was injured when he was struck by a motor vehicle driven by George Morgan. The accident occurred at [sic] June 16, 2009 at 2:25 a.m. in Enid, Oklahoma. The Claimant had just left the Ramada Inn bar and was returning to his room at the Baymont Inn, where he was staying with his employer. The Claimant was struck by Mr. Morgan as he crossed Highway 412.

2. Following this accident, the Claimant was treated for his extensive injuries, which included an amputation of his right leg and the loss of sight in one eye. The Claimant's initial treatment was provided in the State of Oklahoma.

3. Following his medical treatment in Oklahoma, the Claimant was transferred to and received further care and treatment from Promise Regional Medical Center and Radiology Professionals. His dates of service at these facilities were from September 4, 2009 to October 29, 2009.

4. A claim for workers compensation benefits was filed with the Kansas Department of Labor, Division of Workers Compensation on October 6, 2009. Claimant sent a seven day demand to the Respondent on October 6, 2009, demanding the provision of competent and qualified medical treatment and payment of indemnity benefits among other things.

5. Upon receipt of the claim, the Respondent and Insurance Carrier denied liability for the same and refused to voluntarily provide medical or indemnity benefits to the Claimant.

6. On November 11, 2009, Promise Regional [M]edical Center and Radiology Professionals submitted their billing invoices to Medicaid (Kansas Health Policy Authority) who, per their contract with the providers, paid the same on November 30, 2009. A zero account balance was shown on that date.

7. A preliminary hearing was held pursuant to K.S.A. 44-534 on February 18, 2010, with Brad E. Avery presiding. Judge Avery issued an "Order for Compensation" on February 24, 2010, finding that the Claimant was entitled to the payment of temporary total disability as well as his medical bills.

8. The Respondent and Insurance Carrier appealed the Order to the Kansas Workers Compensation Appeals Board. On April 21, 2010, Appeals Board Judge Julie Sample found the claim to be compensable and stated "the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim" (citing K.S.A. 44-534a).

9. On May 5, 2010, the Kansas Building Industry Workers Compensation Fund fully reimbursed the Kansas Health Policy Authority for all sums paid by Medicaid on behalf of the Claimant.

10. On May 25, 2010 and on January 18, 2011, Promise Regional Medical Center and Radiology Professionals made demand on Respondent and its Insurance Carrier for payment of their medical bills under the Kansas Medical Fee Schedule per the Kansas Workers Compensation Act.

11. The medical bills from Promise Regional Medical Center totaled \$123,827.00. Medicaid paid the sum of \$31,904.14 and discounted the sum of \$48.00 and wrote off the sum of \$91,877.86.

12. The medical bills from Radiology Professionals totaled \$705.00. Medicaid paid the sum of \$151.52 and discounted \$284.48 and \$269.00.

On December 22, 2011, an Initial Order was entered finding that Kansas Medicaid was reimbursed by Kansas Building Industry Workers Compensation Fund for medical services provided to claimant, Jesse J. Atkins, by Promise Regional. The Presiding Officer found that pursuant to the agreements Promise Regional and Radiology Professionals had with Kansas Medicaid, those medical providers cannot receive from respondent and its insurance carrier any payments for their services above the amounts already received by them from Kansas Medicaid.

#### **PRINCIPLES OF LAW**

K.A.R. 30-5-59 states in part:

Kansas Administrative Regulations

Agency 30. Social and Rehabilitation Services

Article 5. Provider Participation, Scope of Services, and Reimbursements for the Medicaid (Medical Assistance) Program

##### **30-5-59 Provider participation requirements**

. . . .

The following shall be prerequisites for participation in and payment from the medicaid/medikan program. Any provider of services to foster care consumers, adoption support consumers, Kan Be Healthy consumers, or other consumers who have special needs may be excluded from these prerequisites if the secretary determines that a medically necessary item of durable medical equipment or a medically necessary service can be cost-efficiently obtained only from a provider not otherwise eligible to be enrolled within the current program guidelines. (a) Enrollment. Each participating provider shall perform the following:

. . . .

(e) Payment. Each participating provider shall meet the following conditions:

(1) Accept as payment in full, subject to audit when applicable, the amount paid by the medicaid/medikan program for covered services.

K.S.A. 2008 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2008 Supp. 44-510i(c) states in part:

The director shall prepare and adopt rules and regulations which establish a schedule of maximum fees for medical, surgical, hospital, dental, nursing, vocational rehabilitation or any other treatment or services provided or ordered by health care providers and rendered to employees under the workers compensation act and procedures for appeals and review of disputed charges or services rendered by health care providers under this section . . . .

K.S.A. 44-510j(h) provides in relevant part:

Any health care provider, nurse, physical therapist, any entity providing medical, physical . . . rehabilitation services . . . medical supply establishment, surgical supply establishment, ambulance service or hospital which accept the terms of the workers compensation act by providing services or material thereunder **shall be bound** by the fees approved by the director . . . . (Emphasis added.)

### ANALYSIS

This claim is before the Board on a request for review of the Initial Order entered by Presiding Officer Sandra L. Sharon on December 22, 2011. Judge Sharon is associated with the Office of Administrative Hearings, which is part of the Kansas Department of Administration. She was appointed by the Director of Workers Compensation as a hearing officer to preside over the medical fee dispute at issue in this proceeding. The appointment of the Presiding Officer was made pursuant to K.S.A. 44-510j and a contract entered into between the Kansas Department of Labor, the parent agency of the Division of Workers Compensation, and the Office of Administrative Hearings.

The Board has jurisdiction to review the Initial Order pursuant to K.S.A. 44-510j(d)(2).<sup>2</sup> The Board's scope of review is defined in the same section: "The decision of the director shall be affirmed unless the board determines that the decision was not supported by substantial competent evidence." "Substantial competence evidence" is not defined in the Workers Compensation Act<sup>3</sup>, nor is it defined in the Kansas Administrative Procedure Act.<sup>4</sup> However, our appellate courts have defined what "substantial competent evidence" means. In *Redd*<sup>5</sup> the Kansas Supreme Court held that substantial evidence is evidence possessing something of substance and relevant consequence, which induces the conclusion that the award is proper; it furnishes a basis of fact from which the issue raised can be reasonably resolved. In *Herrera-Gallegos*<sup>6</sup> the Court of Appeals held that substantial evidence is evidence that a reasonable person might accept as being sufficient to support a conclusion.

There is no dispute as to the facts, to which the parties stipulated. However, the Board finds that the conclusions of law and the decision set forth in the Presiding Officer's Initial Order are unsupported by substantial competent evidence. The Presiding Officer misapplied the law applicable to this claim and relied on law which is inapplicable to this claim.

In arriving at her conclusions, the Presiding Officer relied on K.A.R. 30-5-59(e)(1). That administrative regulation concerns the requirements for medical providers to participate in and receive payment from Kansas Medicaid. The subsection to which the Presiding Officer referred requires that each participating medical provider "[a]ccept as payment in full, subject to audit when applicable, the amount paid by the medicaid/medikan program for covered services." K.A.R. 30-5-59 is a part of the Kansas Administrative Regulations which deal with Social and Rehabilitation Services. The provision upon which the Presiding Officer relied does not make reference to the Kansas Workers Compensation Act, nor does the Act refer to or incorporate K.A.R. 30-5-59, or any part thereof. Therefore, there is no substantial competent evidence which would support the conclusion that the cited regulation is applicable to this claim.

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<sup>2</sup> See *Greathouse v. KASB Risk Management Services*, 44 Kan. App. 2d 29, 237 P.3d 1250 (2010).

<sup>3</sup> K.S.A. 44-501 *et. seq.*

<sup>4</sup> K.S.A. 77-501 *et. seq.*

<sup>5</sup> *Redd v. Kansas Truck Center*, 291 Kan. 176, 183-84, 239 P.3d 66 (2010).

<sup>6</sup> *Herrera-Gallegos v. H & H Delivery Service*, 42 Kan. App. 2d 360, Syl. ¶ 1, 212 P.3d 239 (2009).

Subject to well-defined exceptions, the Kansas Workers Compensation Act applies to “all employments wherein employers employ employees within this state . . . .”<sup>7</sup> In this claim, ALJ Brad Avery entered a preliminary order following a hearing held pursuant to K.S.A. 44-534a. The ALJ made a preliminary determination that this claim is compensable under the Act and awarded temporary total disability benefits and medical compensation, including the payment of all medical bills attached to the preliminary hearing transcript. Respondent and its insurance carrier filed for review by the Kansas Workers Compensation Board. As permitted by K.S.A. 44-551(i)(2)(A), only one Board Member, Julie A.N. Sample, decided the matter. An order was entered by Board Member Sample on April 21, 2010, which affirmed the ALJ’s preliminary hearing order in all respects.

The preliminary hearing order entered by the ALJ, and affirmed by the Board, is binding on all parties, including respondent and its insurance carrier, pending the conclusion of a full hearing on the claim.<sup>8</sup> There is nothing in the record which indicates a full hearing on the claim has been concluded.

As quoted above, K.S.A. 44-510h(a) defines in broad terms the obligation of the employer to provide medical treatment in a workers compensation claim. There is no dispute among the parties that a medical fee schedule has been promulgated pursuant to K.S.A. 44-510i, which was in effect at all relevant times in this claim. Under the medical fee schedule, medical providers “shall be bound” by the amounts allowed under the fee schedule.<sup>9</sup> With one exception, which no party argues is applicable here, K.S.A. 44-510i(e) requires that medical providers, including hospitals, “shall be paid either such health care provider, hospital or other entity’s usual and customary charge for the treatment, care and attendance or the maximum fees set forth in the schedule, whichever is less.”

No authority is cited by the Presiding Officer or the employer/carrier to support the notion that K.A.R. 30-5-59 has any applicability to this proceeding. Rather, the obligations of the respondent and carrier are very well defined in those provisions of the Kansas Workers Compensation Act discussed in this order and the preliminary hearing order entered by Judge Avery as affirmed by the Board.

### **CONCLUSION**

The Board finds that there is not substantial competence evidence to support the conclusions of law and the decision of the Presiding Officer in her December 22, 2011, Initial Order.

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<sup>7</sup> K.S.A. 44-505.

<sup>8</sup> K.S.A. 44-534a(a)(2).

<sup>9</sup> K.S.A. 44-510j(h).

**WHEREFORE**, it is the finding, decision and order of the Board that the Initial Order entered by Presiding Officer Sandra L. Sharon dated December 22, 2011, is reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2012.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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